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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SERGIO ZAMUDIO CALDERON, Defendant and Appellant.	B286940 (Los Angeles County Super. Ct. No. VA141040)

APPEAL from an order of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Buehler & Kassabian and George W. Buehler for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Sergio Zamudio Calderon appeals the trial court's denial of his motion to withdraw his guilty plea to continuous sexual abuse of a child and penetration by a foreign object of a minor over the age of 14. He contends his trial counsel provided ineffective assistance by failing to seek to suppress his confession as involuntary and violative of *Miranda v. Arizona*,[1] and by failing to advise him that the confession was inadmissible. We disagree, and affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Calderon's Molestation of M.*[2]

In 2013, Calderon sometimes spent the night at the home where his girlfriend, his girlfriend's daughter, M., and other family members were living. On M.'s twelfth birthday, while Calderon and M. were alone in the kitchen, he pulled M. close to him and kissed her on the lips. Thereafter, at night Calderon would come into M.'s bedroom, pull down his shorts, and force her to touch his penis and masturbate him. Subsequently, M. and her family moved into Calderon's home. On several occasions, Calderon came into M.'s room and engaged in the same conduct. On five or fewer occasions, he also groped and sucked her breasts and digitally penetrated her vagina. Although she struggled, she was unable to prevent his actions. Eventually M. told the assistant principal at her school about the abuse.

In a recorded interview with a detective, and after being given *Miranda* advisements, Calderon admitted touching M.'s

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[2] Because Calderon pled guilty prior to trial, we derive the facts from M.'s testimony at the preliminary hearing.

breasts and vagina, digitally penetrating her vagina twice, and placing her hand on his penis.[3]

2. *Charges,* Marsden *Hearing, and Plea*

In an amended information, the People charged Calderon with committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a), counts 1 and 2);[4] continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a), count 3); aggravated sexual assault of a child under 14 (§§ 269, subd. (a)(5), 289, subd. (a), counts 4—7); and penetration by a foreign object of a minor over the age of 14 (§ 289, subd. (a)(1)(C), count 9).[5]

Shortly after the amended information was filed, Calderon requested substitution of counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. At a hearing conducted outside the prosecutor's presence, defense counsel detailed her efforts to develop a defense in the case.[6] Counsel explained she had

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[3] We discuss the interview and Calderon's confession in more detail *post.*

[4] All further undesignated statutory references are to the Penal Code.

[5] The trial court granted Calderon's motion, brought pursuant to section 995, to dismiss count 8, aggravated sexual assault.

[6] Because Calderon asserts an ineffective assistance claim, for purposes of this appeal the attorney-client privilege does not apply with respect to the facts he has placed at issue. (*People v. Ledesma* (2006) 39 Cal.4th 641, 691—692; *People v. Dennis* (1986) 177 Cal.App.3d 863, 873; *In re Gray* (1981) 123 Cal.App.3d 614,

reviewed the transcript of Calderon's confession several times, and had gone over it with him. She had consulted an expert, who reviewed an audiotape of the confession and concluded the confession was voluntary. She consulted with an attorney at the Public Defender's appellate department; based on her conversations with him, she concluded it was unlikely the confession would be excluded based on a *Miranda* violation. Nonetheless, counsel intended to litigate the validity of the confession vigorously. Counsel also stated that a defense investigator had interviewed the victim and concluded she was "very credible" and a jury was likely to believe her testimony.

Trial counsel described, at the *Marsden* hearing and at a subsequent appearance, the progress of plea negotiations in the case. The People had initially made offers of 18 and 19 years, which Calderon refused. It was trial counsel's experience that in similar cases, the People typically offered between 33 and 40 years. Just before trial, Calderon informed trial counsel that he wanted to accept the 18-year offer. The deputy district attorney informed trial counsel that the "deal was off the books since . . . the jury was coming in." However, after speaking with her supervisor, the deputy district attorney successfully restored the prior offer, with the provision that Calderon would waive "back time." Calderon accepted the deal. After being advised of and waiving his rights and completing a "Felony Advisement of Rights, Waiver, and Plea Form," Calderon pled guilty to two counts, continuous sexual abuse of a child (§ 288.5, subd. (a)) and

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615—616; *People v. Knight* (2015) 239 Cal.App.4th 1, 6—9; Evid. Code, § 958.)

sexual penetration by a foreign object (§ 289, subd. (a)(1)(C)), in exchange for an 18-year term.

3. *New Trial Motion*

Prior to sentencing, private counsel assumed Calderon's representation and moved to withdraw Calderon's plea.[7] Motion counsel argued that trial counsel had provided ineffective assistance by failing to move to suppress Calderon's confession prior to his plea, and by failing to tell Calderon that there was a "good chance" such a motion would be successful. Had Calderon known his confession could be excluded at trial, he would not have pled guilty. As discussed *post*, in support of the motion Calderon offered his own declaration, as well as declarations from motion counsel and a Spanish language interpreter.

The trial court denied the motion to withdraw the plea, finding it was not supported by good cause. The court found Calderon had failed to establish the prejudice component of his ineffective assistance claim. It reasoned that, based upon the court's reading of the preliminary hearing transcript, even without the confession the People's case was "pretty solid" and "very good." Calderon had been facing 120 years to life, but trial counsel negotiated an 18-year term, which the court found to be a "tremendous, tremendous deal."[8]

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[7] For ease of reference, we hereinafter sometimes refer to the attorney who represented Calderon through the plea proceedings as "trial counsel," and the attorney who represented him in regard to the motion to withdraw the plea as "motion counsel."

[8] Contrary to Calderon's assertions that the trial court "did not dispute that the confession should be suppressed," the court did not explicitly or impliedly hold that a suppression motion would have had merit. It based its denial of the motion to

4. *Sentencing*

The trial court sentenced Calderon, in accordance with the negotiated disposition, to a term of 18 years in prison. It imposed a restitution fine, a suspended parole revocation restitution fine, a court security fee, and a criminal conviction fee. It dismissed the remaining counts. Calderon obtained a certificate of probable cause and timely appealed.

DISCUSSION

Calderon contends the trial court abused its discretion by denying his motion to withdraw his plea. He urges that his trial counsel failed to investigate the admissibility of his interview statements and did not advise him that the statements could have been suppressed. Had he been aware of this circumstance, he would not have pled guilty. Therefore, he contends, his plea was based on mistake and ignorance and was involuntary, and he should have been permitted to withdraw it.

1. *Forfeiture*

Preliminarily, we address the People's contention that Calderon has forfeited his right to argue the confession was involuntary or the interview violated *Miranda.* The People rely on the principle that after entering a plea, a defendant may not attack the sufficiency or admissibility of the evidence. (See *People v. Thurman* (2007) 157 Cal.App.4th 36, 43 [a guilty plea concedes that the prosecution possesses legally admissible

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withdraw the plea on the fact Calderon failed to establish the prejudice component of his ineffective assistance claim. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697 [if it is easier to dispose of an ineffective assistance claim on the ground of lack of prejudice, that course should be followed]; *In re Cox* (2003) 30 Cal.4th 974, 1019—1020.)

evidence sufficient to prove guilt, and waives any right to challenge sufficiency or admissibility of the evidence].)

In support of their forfeiture claim, the People point to, inter alia, *People v. DeVaughn* (1977) 18 Cal.3d 889. There, the defendants pled guilty after the trial court denied motions to suppress their confessions. The trial court issued a certificate of probable cause purporting to preserve the denial of the suppression motions as an issue cognizable on appeal. (*Id.* at p. 893.) However, appellate review of the ruling was waived by the guilty plea, and could not be restored by a certificate of probable cause, even though the confessions should have been suppressed. (*Ibid.*; see *People v. Shults* (1984) 151 Cal.App.3d 714, 720.) *DeVaughn* explained: "Given the accused's guilty plea, an extrajudicial statement relating to his guilt of a charged crime does not, by reason of a claim that it was involuntarily or improperly induced, raise an issue on appeal based on 'constitutional, jurisdictional or other grounds going to the legality of the proceedings' resulting in the plea." (*DeVaughn*, at p. 896.) But, the court continued: "On the other hand, a claim that the *plea* as distinguished from an extrajudicial statement was improperly induced would challenge the legality of the proceedings resulting in the plea and would thus be cognizable on an appeal pursuant to section 1237.5." (*Ibid.*) The defendants therefore could not claim on appeal that their confessions were involuntary, but could argue their pleas were improperly induced. (*Ibid.*)

Here, the People have misconstrued Calderon's argument. He is not challenging a pre-plea ruling on a motion to suppress; indeed, his complaint is that no such motion was ever made. He does not contend the plea is invalid because it was unsupported

by legally admissible evidence. Instead, his theory is that the plea was involuntary because he was unaware, due to counsel's purportedly deficient performance, that the confession could have been excluded. This is the sort of contention that *DeVaughn* found was *not* forfeited by a plea.

2. *Calderon Has Failed to Establish That His Counsel Provided Ineffective Assistance or That His Plea Was Based on Mistake or Ignorance*

Nonetheless, Calderon's arguments fail on the merits.

(a) *Applicable legal principles*

"At any time before judgment, . . . a trial court may permit a defendant to withdraw a guilty plea for 'good cause shown.' (§ 1018.) 'Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea' under section 1018 [citation], and section 1018 states that its provisions 'shall be liberally construed . . . to promote justice.' " (*People v. Patterson* (2017) 2 Cal.5th 885, 894; *People v. Alexander* (2015) 233 Cal.App.4th 313, 318.) A defendant who wishes to withdraw his plea has the burden to show, by clear and convincing evidence, that there is good cause for withdrawal. (*Ibid*; *People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415—1416.) A plea may not be withdrawn simply because the defendant has changed his or her mind. (*People v. Breslin*, at p. 1416; *People v. Archer* (2014) 230 Cal.App.4th 693, 702.) A trial court's ruling on a motion to withdraw a plea under section 1018 is reviewed for abuse of discretion. (*People v. Patterson*, at p. 894; *People v. Hunt* (1985) 174 Cal.App.3d 95, 103.) We must adopt the trial court's factual findings if supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; *People v. Archer*, at

p. 702.) Guilty pleas should not be set aside lightly. (*People v. Archer*, at p. 702; *People v. Hunt*, at p. 103.)

A defendant is entitled to the effective assistance of counsel during plea negotiations. (*Lafler v. Cooper* (2012) 566 U.S. 156, 165; *In re Alvernaz* (1992) 2 Cal.4th 924, 933; *In re Vargas* (2000) 83 Cal.App.4th 1125, 1133.) Defense counsel is obliged to investigate the legal and factual bases for potential defenses, and make appropriate motions where a diligent and conscientious advocate would do so. (*In re Vargas*, at p. 1133; *People v. Maguire* (1998) 67 Cal.App.4th 1022, 1028; *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437.) Where ineffective assistance results in a defendant's decision to plead guilty, he is entitled to an opportunity to withdraw his plea. (*In re Vargas*, at p. 1134; *People v. Maguire*, at p. 1028.)

"The test for ineffective assistance of counsel is a demanding one." (*People v. Acosta* (2018) 28 Cal.App.5th 701, 706.) A defendant has the burden to show his counsel's performance was deficient, and that he or she suffered prejudice as a result. (*People v. Mikel* (2016) 2 Cal.5th 181, 198; *Strickland v. Washington*, *supra*, 466 U.S. at p. 687; *People v. Acosta*, at p. 706.) If the defendant makes an insufficient showing on either one of these components, the claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) To establish prejudice in regard to a plea, the defendant must establish not only incompetent performance by counsel but also a reasonable probability that, but for counsel's incompetence, he or she would not have pled and would have insisted on proceeding to trial. (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 934; *People v. Dillard* (2017) 8 Cal.App.5th 657, 668; *People v. Breslin*, *supra*, 205 Cal.App.4th at pp. 1416, 1418.)

(b) *Calderon has failed to show counsel's performance was deficient, or that he was unaware suppression was an issue*

Calderon's argument rests on three key premises: first, trial counsel failed to sufficiently investigate the possibility his confession could be suppressed; second, the confession was clearly excludable; and third, had he known the confession could be excluded, he would not have pled. Calderon's conclusion fails because none of these premises is borne out by the record.

1. Counsel diligently investigated

The record does not demonstrate that defense counsel failed to investigate either the facts or the law in the manner required of a reasonably competent attorney. The record shows that counsel identified the *Miranda* issue and took pains to evaluate it thoroughly. According to her statements at the *Marsden* hearing, counsel went over the transcript of the confession with appellant, reviewed it herself multiple times, consulted with a confessions expert, consulted with an appellate attorney regarding admissibility, and "researched some of the legal issues" herself. Based on these efforts, she concluded suppression was unlikely, but nonetheless intended to vigorously advocate for suppression prior to trial through motions in limine. Although the expert concluded the confession was voluntary, counsel was considering calling him at trial to testify to the reasons people make false confessions. Thus, the record does not suggest counsel failed to "recognize or even to conduct any research into the legal significance" of the purported problems

with the confession. Calderon's assertions to the contrary simply ignore the record.[9]

2. Calderon was aware of the suppression issue

Nor does the record suggest Calderon was in the dark about the possibility of suppression. Calderon was present at the *Marsden* hearing when trial counsel detailed her investigation into, and efforts regarding, the possibility of suppression. He therefore would have heard counsel's discussion of the issue. Also at the *Marsden* hearing, the court inquired whether trial counsel had talked to Calderon about "the confessions expert, your *Miranda* violation as [the basis for] a possible [Evidence Code section] 402, the interviews . . . ?" Counsel replied, "Yes, I have. . . . Numerous times." The court then asked Calderon: "Your attorney has stated on the record at length the things she has done to try to get ready in this case. She said that she has told you those things. Is she mistaken? Did you not know about any of this?" Calderon did not reply. And, in his declaration filed in support of his motion to withdraw his plea, Calderon stated, "I was advised by [trial counsel] that she had an expert on confessions who reviewed the interview with the detective . . . ." Clearly, Calderon was aware of the suppression issue.

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[9] In support of his motion to withdraw the plea below, Calderon offered a declaration from motion counsel, stating that motion counsel had examined trial counsel's file but did not find "any evidence of research" regarding grounds for suppression, memoranda on the subject, or a draft motion to suppress. But trial counsel's statements at the *Marsden* hearing demonstrated her familiarity with the issues and efforts to pursue suppression. The absence of written notes or memoranda on the subject does not demonstrate otherwise.

3. Trial counsel did not err by concluding suppression was unlikely

To the extent Calderon's argument is that trial counsel incorrectly led him to believe suppression was unlikely, we discern no deficient performance. Calderon's *Miranda* and involuntariness claims are not as strong as he suggests.

Calderon complains that the confession should have been suppressed for four reasons: (1) it was involuntary because it was induced by false promises of leniency; (2) the *Miranda* advisements provided were defective because Detective Valasi,[10] who interviewed Calderon, mispronounced some Spanish words, rendering some of the warnings unclear; (3) Valasi failed to honor Calderon's request for counsel during the interview; and (4) Valasi failed to adequately advise Calderon he was entitled to an attorney free of cost when he expressed confusion about the issue.

(i) *Voluntariness*

When interviewing Calderon, Detective Valasi stated that there were two sides to "what happened," the truth and lies. She had investigated similar cases for ten years, and had spoken to people who made mistakes, and to others who "do things because they are very bad people." She did not want to talk to the "bad" or "nasty" people, but she did not believe Calderon was such a person. She asked, "so, what happened with [M.]?" Calderon replied that M. was "playful" but "it doesn't go beyond that." Valasi reiterated that she knew when a person was telling the truth or lying. M. had told Valasi what happened, and Valasi believed her, because M. had no reason to lie. Valasi said: "I

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[10] Detective Valasi's first name is not reflected in the record.

know that because, when I spoke to her, she didn't want you to be here" "[b]ecause you are very important to her mother . . . and you also helped [the mother] and [M.'s] brother" by giving the family a place to stay when they did not have one. Valasi said she knew Calderon touched M., but wanted to know "if it was something forceful" or "was a mistake." Calderon denied forcefully touching M. Valasi said she wanted the truth, because "people who tell the truth, you could forgive 'em"; no one except God is perfect; and many people make mistakes. After Calderon made an equivocal reference to counsel (discussed *post*), Valasi said she wanted to give Calderon the chance or opportunity to tell her what happened.

Calderon contends that the detective's statements about forgiveness; the contrast between "bad" persons and persons who make mistakes; his "chance" or opportunity to explain what happened; and M.'s statement that she did not want him to be "here," implied that if he admitted touching M., "going home was in the cards" and he would receive an "advantage or reward," i.e., that charges would be dropped or "some other substantial form of leniency" would ensue. We are not persuaded.

"A confession elicited by any promise of benefit or leniency, whether express or implied, is involuntary and therefore inadmissible, but merely advising a suspect that it would be better to tell the truth, when unaccompanied by either a threat or a promise, does not render a confession involuntary. [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 600; *People v. Tully* (2012) 54 Cal.4th 952, 993; *People v. Holloway* (2004) 33 Cal.4th 96, 115.)

Calderon's interpretation of the detective's statements is strained. The detective made no explicit promises of lenience.

We have reviewed the interview transcript and conclude that no reasonable person would infer an implied promise, either. Nothing about the challenged statements remotely suggested Calderon might go home, have charges dropped, or receive any other benefit if he admitted the molestation. (See *People v. Carrington* (2009) 47 Cal.4th 145, 174 [statements that officer would inform district attorney of defendant's cooperation, and that full cooperation might be beneficial in some unspecified way, were not coercive]; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1250 [officers may freely encourage honesty]; *People v. Holloway*, *supra*, 33 Cal.4th at p. 116 [suggestion that, if killings were accidental, this circumstance could make a lot of difference, fell short of a promise of lenient treatment].) Although Calderon's declaration offered in support of his motion stated he believed the detective meant he "would be released from jail and would go home and no charges would be filed," the trial court was not obliged to credit this self-serving statement. (See *People v. Dillard*, *supra*, 8 Cal.App.4th at p. 665 [in ruling on motion to withdraw plea, trial court may take into account defendant's credibility and his interest in the outcome of the proceedings].)

(ii) *Adequacy of the* Miranda *advisements*

Calderon contends his confession was inadmissible because Detective Valasi failed to advise him of his rights as required by *Miranda*. A custodial interrogation must be preceded by *Miranda* warnings and by the suspect's knowing and intelligent waiver of them. (*Florida v. Powell* (2010) 559 U.S. 50, 59; *People v. Elizalde* (2015) 61 Cal.4th 523, 530; *People v. Dykes* (2009) 46 Cal.4th 731, 751.) "*Miranda* prescribed the following four now-familiar warnings: [¶] . . . '[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that

anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' " (*Florida v. Powell*, at pp. 59–60; *Miranda*, *supra*, 384 U.S. at p. 479.) A statement obtained in violation of a suspect's *Miranda* rights may not be admitted to establish guilt in the prosecution's case-in-chief. (*People v. Jackson* (2016) 1 Cal.5th 269, 339; *People v. Peevy* (1998) 17 Cal.4th 1184, 1196.)

Here, Detective Valasi initially gave all four required warnings. According to the translated transcript of the interview, she informed Calderon that he had "the right to remain silent"; "Whatever you say [unintelligible] used against you in court"; "you have the right to have an attorney present while we speak"; and "if you want an attorney, but you can't afford one, the court will [unintelligible] before we speak. . . ." After each statement, the detective asked, "do you understand?" and each time, Calderon said, "Yes."

Calderon argues that two of the advisements were inadequate because Valasi failed to use the precise language of *Miranda*, i.e., that anything he said could be used against him in a court of law, and that if he could not afford an attorney, one would be appointed for him prior to questioning. In his motion below, Calderon presented declarations signed under penalty of perjury from Nancy Moyna, a licensed and court certified Spanish language interpreter, who listened to the audio recording of the interview. Moyna stated that Valasi "struggled with the pronunciation of some of the words, reading them very fast." Moyna would have translated Valasi's advisement regarding the use of Calderon's statements at trial as "What you say" "might"

be "used against you in the court." The detective's advisement of the right to an attorney, literally translated, was "If you want an attorney, but you don't have money, the court give you one before we talk . . . ."

Miranda warnings "need not be presented in any particular formulation or 'talismanic incantation.' [Citation.]" (*People v. Wash* (1993) 6 Cal.4th 215, 236; *California v. Prysock* (1981) 453 U.S. 355, 359.) *Miranda* warnings "are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' [Citation.] Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[yed] to [a suspect] his rights as required by *Miranda*.' " (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203; *Florida v. Powell*, *supra*, 559 U.S. at p. 60; *People v. Wash*, at pp. 236–237.)

While the detective's recitation of portions of the warnings were not mirror images of *Miranda*'s language, they were sufficiently unambiguous to reasonably convey Calderon's rights. The key points, as described by Moyna—that whatever Calderon said might be used against him in court, and that the court would "give" him an attorney if he could not afford one—were at least arguably sufficient. As defense counsel reasonably concluded, the detective "got [her] points across" despite her lack of fluency. (See *People v. Marquez* (1992) 1 Cal.4th 553, 570–571.) Furthermore, at the outset of the interview, Valasi advised that her Spanish might be "not good." She told Calderon, "if you don't understand let me know, and we'll see if I can explain it" either "[i]n English or in Spanish, to make sure you understand, okay?"

Yet Calderon never asked for clarification or suggested he did not understand her words. Moreover, much of the uncertainty regarding what Valasi actually said appears to arise from the fact that portions of the recording were unintelligible. Had counsel brought a suppression motion, Valasi might have testified, leaving open the possibility that she might have explained that her words more closely matched the *Miranda* language.

Calderon's reliance on *United States v. Botello-Rosales* (9th Cir. 2013) 728 F.3d 865, is unavailing. There, a detective advised the defendant, "If you don't have the money to pay for a lawyer, you have the right. One, who is free, could be given to you." (*Id.* at p. 867.) This warning was insufficient, the Ninth Circuit reasoned, because the word used for "free" literally translated to "available or at liberty to do something." (*Ibid.*) The phrasing suggested the right to appointed counsel was contingent on the lawyer's availability. (*Ibid.*) Here, according to Calderon's witness, the literal translation of counsel's advisement was, "If you want an attorney, but you don't have money, the court give you one before we talk . . . ." This more clearly conveyed the right to appointed counsel than did the language at issue in *Botello-Rosales.*

(iii) *Failure to honor Calderon's invocation of the right to counsel*

Calderon next argues that he requested an attorney during the interview and Detective Valasi failed to honor his request.

After Valasi told Calderon that she believed M., that she wanted Calderon to tell her the truth, and that people make mistakes, the following exchange transpired:

"[Calderon]: Can I ask you for a favor?

"[Valasi]: The what?

"[Calderon]: I don't know if I can tell you something.

"[Valasi]: What? Aha.

"[Calderon]: Uhm . . . I don't know what to say, I have, whether I have the right to have an attorney here with me, because I don't, don't know.

"[Valasi]: Okay. So, do you want to talk to me or do you want an attorney to—?

"[Calderon]: For both to be present.

"[Valasi]: Okay, all right.

"[Calderon]: Because no, no.

"[Valasi]: Okay, that's all right.

"[Calderon]: Yes, um, but I don't know how. This is a question, I don't, don't want you to get angry.

"[Valasi]: [overlapping voices] I—

"[Calderon]: It's another question, because I, because I don't, I don't know about this.

"[Valasi]: If you want an attorney here when we talk—

"[Calderon]: Mhm.

"[Valasi]: You can have an attorney here.

"[Calderon]: Mhm.

"[Valasi]: Okay. I'm just here to see what happened. Because as I said: there are two stories, her story and your story. I, we know that something did happen, I know that. I want to give you that, uh, the chance, what do you call it? Do you know what a chance is?

"[Calderon]: Yes, yes.

"[Valasi]: How do you say it in Spanish?

"[Calderon]: A chance.

"[Calderon]: A, yes.

"[Calderon]: An opportunity.

"[Valasi]: An opportunity to tell me what happened with—what happened. Okay, so, we can talk or we can talk to a—if you want an attorney, you can have an attorney. What do you want to do?

"[Calderon]: It's all right, we can talk.

"[Valasi]: Us?

"[Calderon]: Yes.

"[Valasi]: Do you want an attorney or not?

"[Calderon]: No, it's fine.

"[Valasi]: So you don't want an attorney?

"[Calderon]: I can't afford an attorney.

"[Valasi]: Do you remember I read you those . . .

"[Calderon]: No.

"[Valasi]: . . . your rights? Do you remember I read your rights and all the stuff? [overlapping voices, unintelligible]

"[Calderon]: [overlapping voices] Yes, all right. That's fine.

"[Valasi]: So do you want to talk to me? What happened?

"[Calderon]: Yes, I did touch her."

No *Miranda* violation occurred here, because Calderon did not make an unequivocal request for counsel. "If a defendant waives his right to counsel after receiving *Miranda* warnings, police officers are free to question him. [Citation.] If, postwaiver, a defendant requests counsel, the officers must cease further questioning until a lawyer has been made available or the defendant reinitiates. [Citation.] However, the request for counsel must be articulated 'unambiguously' and 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' [Citation.] If a defendant's reference to an attorney is ambiguous or equivocal in that 'a reasonable officer in light of the

circumstances would have understood only that the suspect *might* be invoking the right to counsel, [precedent does] not require the cessation of questioning.' [Citation.]" (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 19; *Davis v. United States* (1994) 512 U.S. 452, 459; *People v. Cunningham* (2015) 61 Cal.4th 609, 646; *People v. Bacon* (2010) 50 Cal.4th 1082, 1105.) "There is no requirement law enforcement officers interrupt an interrogation to ask clarifying questions following a suspect's ambiguous or equivocal responses that might or might not be construed as an invocation of the right to an attorney." (*People v. Cunningham*, at p. 646; *People v. Williams* (2010) 49 Cal.4th 405, 427.)

"Courts have found references to requests for attorneys to be objectively equivocal where a defendant uses conditional language or ambiguities." (*People v. Shamblin*, *supra*, 236 Cal.App.4th at p. 19.) Among the statements courts have found too equivocal to constitute an unambiguous request for counsel are the following: " 'If you can bring me a lawyer, that way . . . I can tell you everything that I know and everything that I need to tell you and someone to represent me.' " (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 216, 219.) " 'I think I probably should change my mind about the lawyer now. I, I need advice here. Don't you guys think I need some advice here? I think I need some advice here.' " (*People v. Shamblin*, at pp. 18, 20.) " 'I think it'd probably be a good idea for me to get an attorney.' " (*People v. Bacon*, *supra*, 50 Cal.4th at p. 1105.) " 'Should I have somebody here talking for me, is this the way it's supposed to be done?' " (*People v. Cunningham*, *supra*, 61 Cal.4th at pp. 645–647.) " 'Maybe I should talk to a lawyer.' " (*Davis v. United States*, *supra*, 512 U.S. at pp. 455, 462.)

Calderon's words were similarly equivocal. His statements —"I don't know what to say, I have, whether I have the right to have an attorney here with me, because I don't, don't know," and that he would like "both to be present"—were ambiguous. In light of this ambiguity, Valasi clearly informed Calderon he could have an attorney present, and repeatedly attempted to clarify Calderon's wishes. This was proper. (See *People v. Sauceda-Contreras*, *supra*, 55 Cal.4th at pp. 219—220.) In response to Valasi's attempts to clarify, Calderon never stated he wanted an attorney. Instead, he repeatedly stated that he and the detective could talk.

Calderon argues that the detective dropped her friendly and encouraging demeanor when he initially mentioned an attorney, "unsettl[ing] him by showing anger." In his declaration, Calderon stated that Valasi "looked angry" and "folded her file or papers like she was going to end the interview." Certainly, the detective cannot be faulted for moving to end the interview upon the mention of an attorney; in fact, this is what Calderon contends the detective *should* have done. The record reflects nothing suggesting the detective displayed anger or any emotion amounting to coerciveness.

(iv) *Failure to clarify the right to appointed counsel*

Calderon further argues that when he said he could not afford an attorney, Valasi should have confirmed one would be appointed for him without charge. He contends his statements demonstrated he misunderstood the initial advisements, and Valasi's failure to clarify that he had the right to appointed counsel was manipulative.

The translation of the recorded interview shows that when Calderon stated he could not afford an attorney, Valasi immediately reminded him of the rights she had previously read to him. The transcript indicates the immediately following portion of the conversation was unintelligible, and Valasi and Calderon were talking over each other. Thus, it is unclear how, exactly, Valasi responded to Calderon's statement. Certainly, she did not simply ignore it. Trial counsel could reasonably have been concerned that, if a suppression motion was litigated, Valasi might provide testimony demonstrating she did clarify Calderon's right to appointed counsel, contradicting Calderon's account in his declaration that she did not tell him an attorney would be provided at no cost.

(c) *Counsel had a reasonable tactical basis for declining to move for suppression prior to the plea*

In light of the foregoing, the record demonstrates that defense counsel had legitimate tactical reasons for failing to move to suppress prior to trial. "[A] reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had ' " 'no rational tactical purpose' " ' for an action or omission." (*People v. Mickel* (2016) 2 Cal.5th 181, 198; *People v. Woodruff* (2018) 5 Cal.5th 697, 746.) We defer to counsel's reasonable tactical decisions and presume his or her actions can be explained as a matter of sound trial strategy. (*People v. Mai* (2013) 57 Cal.4th 986, 1009; *People v. Brown* (2014) 59 Cal.4th 86, 109; *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437—438, fn. 1 ["[t]here may be cases . . . where for tactical reasons counsel [forgoes] making a motion even though the motion has merit"].)

Defense counsel was faced with the following situation. The success of a suppression motion was uncertain at best. As explained, the involuntariness and invocation of the right to counsel claims were not meritorious. The other two claims—that the wording of the *Miranda* advisements was flawed and that Valasi did not adequately reiterate the right to an appointed attorney—even if meritorious, might well have been undercut if Valasi testified in opposition to the motion, explaining the portions of the transcript that were unintelligible. Moreover, the confession, while doubtless powerful evidence, was not the only arrow in the People's quiver. Counsel could have expected that the victim would testify, just as she did at the preliminary hearing. Counsel was aware, through her investigator, that the victim was believable and that her testimony was likely to be credited by the jury. Thus, even if counsel successfully moved to suppress the confession, the People were likely to present strong evidence of guilt. Had Calderon exercised his right not to testify, there was likely to be no direct evidence rebutting the victim's account. Had Calderon opted to testify and denied the accusations, his confession would likely have been admissible to impeach him, despite any *Miranda* violation. (See *People v. Nguyen* (2015) 61 Cal.4th 1015, 1075; *People v. Peevy*, *supra*, 17 Cal.4th at p. 1188 [statements obtained in violation of *Miranda*, if voluntary, may be used to impeach the defendant's testimony]; *Harris v. New York* (1971) 401 U.S. 222, 224—226; *People v. Case* (2018) 5 Cal.5th 1, 24; *People v. Bradford* (1997) 14 Cal.4th 1005, 1039 [failure to give *Miranda* warnings does not in and of itself constitute coercion].)

Counsel managed to obtain a favorable plea offer. Calderon was facing a potential sentence of 120 years to life in prison. In

trial counsel's experience, the typical offer in similar cases was approximately 33—40 years. Yet counsel managed to obtain an 18-year offer, which the trial court characterized as a "tremendous, tremendous deal." As the People point out, had counsel *unsuccessfully* moved to suppress the confession, a determination that it was admissible would have lessened the People's risk in proceeding to trial, potentially reducing their interest in cementing a plea deal. (See *People v. Gonzalez* (1993) 13 Cal.App.4th 707, 718 ["Of course, if defense counsel had obtained a pretrial determination concerning admissibility [of defendant's extrajudicial statements] and that determination was *admissible*—then, prosecution risks having been reduced, the plea bargain might have been jeopardized"].) In sum, counsel did not provide substandard performance by failing to move to suppress, or by failing to inaccurately tell Calderon that his confession was surely inadmissible. (See *People v. Saldana* (1984) 157 Cal.App.3d 443, 459 [no ineffective assistance when failure to make a pretrial motion is an informed tactical decision].)

(d) *Calderon has failed to establish prejudice*

For the same reasons, Calderon has failed to establish prejudice, i.e., that he would have declined to plead absent counsel's purported errors. " 'In determining whether a defendant, with effective assistance, would have accepted [or rejected] the plea offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she

was amenable to negotiating a plea bargain. In this context, a defendant's self-serving statement . . . [regarding whether] with competent advice he or she *would* [or would not] have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims.' [Citation.]" (*People v. Breslin*, *supra*, 205 Cal.App.4th at p. 1421, citing *In re Alvernaz*, *supra*, 2 Cal.4th at p. 938.)

As we have explained, Calderon faced 120 years to life in prison, but pled to an agreement that required only an 18-year term. Had he proceeded to trial, the likelihood of conviction was very strong, even if the confession had been excluded from the People's case-in-chief. Calderon has therefore failed to establish prejudice, i.e., a reasonable probability that, but for counsel's purported incompetence, he would not have pled and would have insisted on proceeding to trial. (See *People v. Breslin*, *supra*, 205 Cal.App.4th at pp. 1416, 1418; *People v. Archer*, *supra*, 230 Cal.App.4th at p. 706.) Calderon's statement in his declaration that he would not have pled had he known the confession was excludable fails to establish prejudice for two reasons: first, the trial court was not obliged to credit his self-serving assertions. (*People v. Breslin*, *supra*, 205 Cal.App.4th at p. 1421.) And second, for the reasons we have explained, it is not clear that a suppression motion would have succeeded. The trial court's ruling on the motion was not an abuse of discretion.

DISPOSITION

The order denying appellant's motion to withdraw his plea is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.